83-845

No. 82-1480

Office - Supreme Court, U.S.
FILED
[illegible] 1984
ALEXANDER L. STEVAS,
CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1983

IN RE WALTER POLOVCHAK

(STATE OF ILLINOIS,

Petitioner,

vs.

MICHAEL POLOVCHAK and ANNA POLOVCHAK,

Respondents.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

REPLY TO THE ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI

NEIL F. HARTIGAN
Attorney General,
State of Illinois,
188 West Randolph Street,
Suite 2200
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
500 Richard J. Daley Center,
Chicago, Illinois 60602,

MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Counsel of Record
(312) 443-5496

The Schaefer Press, Inc.—(312) [illegible]

TABLE OF CONTENTS

PAGE

Table of Contents i

Table of Authorities i

Reply to the Brief in Opposition to Certiorari 1

THE ILLINOIS SUPREME COURT WAS REQUIRED TO FOLLOW THE DUE PROCESS CLAUSE IN ITS DIRECTIONS ON REMAND 1

A. 1. Due Process 1

2. Ripeness 4

3. Standing 5

4. Waiver 6

B. If Walter Is Forcibly Removed to the Soviet Union, No Federal or State Court Would Have the Power to Protect His Rights 6

Conclusion 8

TABLE OF AUTHORITIES

CASES:

Brown v. *Board of Education of Topeka*, 347 U.S. 483 (1954) 5

In re Gault, 387 U.S. 1 (1967) 4

O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 3

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES:

U.S. Const., Art. VI 2

Ill. Rev. Stat. 1979, Ch. 37, sec 702-3 6

Ill. Rev. Stat. 1983, Ch. 37, secs. 702-3, 702-5, 703-1.1(c) 703-1.1(d), 705-7 ..... 3, 7

Ill. Rev. Stat. 1983, Ch. 110½, sec. 11-1 *et seq.* .. 3

F.R.C.P. 17(a) 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 82-1480

IN RE WALTER POLOVCHAK

(STATE OF ILLINOIS,

Petitioner,

vs.

MICHAEL POLOVCHAK and ANNA POLOVCHAK,

Respondents.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT

REPLY TO THE ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI

Petitioner, the State of Illinois, respectfully submits to this Honorable Court the following reply to Respondents' Answer to the Petition for a Writ of Certiorari.

THE ILLINOIS SUPREME COURT WAS REQUIRED TO FOLLOW THE DUE PROCESS CLAUSE IN ITS DIRECTIONS ON REMAND.

A(1). Due Process

Petitioner has argued that the remand of the Illinois Supreme Court violated the Due Process Clause. Respon-

dents, in their brief in opposition to certiorari, appear to assert that considerations of due process either do not apply or apply only with diminished force to the directions of an appellate court on remand. That idea will not stand analysis for a moment. The United State Constitution is the supreme law of the land, and is binding on all state courts. U.S. Const., Art. VI. Therefore all orders entered in state court, including directions of an appellate court on remand, must meet the requirements of the Due Process Clause.

Respondents first attempt to justify the remand of the Illinois Supreme Court on the grounds that it is necessary to restore the *status quo ante*. That idea may be refuted simply by examining the facts of the case. When this action began, Walter Polovchak was living with his cousin, his parents were preparing to return to the Soviet Union, and Walter was not subject to any kind of state custody or restraint. If respondents had not called in the police, they would have returned to the Ukraine without Walter, and he would have continued to live with his cousin. The remand of the Illinois Supreme Court requires that Walter be forcibly returned to his parents, or, alternatively, be subject to state control or custody until he becomes an adult. Thus the remand orders a drastic change from the *status quo ante*.

Respondents next argue that the remand of the Illinois Supreme Court represents an attempt to allow for intervening circumstances which have arisen while the appeal was pending. Petitioner agrees that appellate courts have the power to consider such intervening circumstances, but would simply point out that no intervening circumstance can justify an unconstitutional order. There is no evidence, and no finding by any court, that Walter

is unable to care for himself, either alone or with the help of relatives. Walter, like many other children, lives with relatives other than his parents. That was the case before this litigation began and, even if it is considered an intervening circumstance, it provides no justification for state control over Walter's life. *O'Connor* v. *Donaldson*, 422 U.S. 563, 576 (1975). Thus no intervening circumstances have occured which provide any constitutional justification for the terms of the remand. If respondents are contending that the state may take control over any child who does not live with his parents, then this Court should grant certiorari in order to reject any such contention.

Respondents' final justification for the remand is that Illinois courts have ". . . inherent plenary jurisdiction to appoint guardians for minors who come before the courts." (Respt. Br. 5) In fact a grant of guardianship in Illinois is controlled by specific Statutory standards. Ill. Rev. Stat., Ch. 37, secs. 702-5, 705-7; Ill. Rev. Stat., Ch. 110 ½, Sec. 11-1 *et. seq.* The Illinois Supreme Court did not pretend to follow those statutes, ignoring, for example, provisions which give a teenage minor the right to nominate his own guardian. Ill. Rev. Stat, Ch. 37, sec. 705-7(2); Ill. Rev. Stat., Ch. 110 ½, sec. 11-5(c). Respondent's position is that a court has plenary power to appoint a guardian for a minor, even without consent of the minor, even without consent of the parents, and even when there is no finding that guardianship is necessary for the protection or welfare of the minor. Such a breathtaking assertion of state power justifies a grant of certiorari.

The Illinois Supreme Court found that under Illinois law the Juvenile Court had no jurisdiction over Walter Polovchak. Then, however, the Illinois Supreme Court remanded to the Juvenile Court with authority to take control over Walter until he becomes an adult. Respondents in their brief have not pointed to any finding by the Illinois Supreme Court to justify such control, and they have not presented any evidence which would justify state control over Walter. This Court should grant certiorari in order to determine that the state may not take control over a minor when there is no finding or evidence that such control is necessary for any purpose.

(2). Ripeness

Respondents argue that this matter is not ripe for review because no one knows what the Cook County Juvenile Court will do on remand. But that is exactly the constitutional problem involved. The Juvenile Court has been given an unlimited grant of authority over Walter's life with nothing to justify that grant of authority.

It is true that on remand the Juvenile Court might do something benevolent (such as allowing Walter to continue to live with relatives) or might do something malevolent (such as ordering Walter to return to the Soviet Union). But even benevolent intentions do not excuse unconstitutional actions. *In re Gault*, 387 U.S. 1, 17-19 (1967). No one would argue that a delinquent minor could be unconstitutionally confined because that confinement might be pleasant or good for him. Walter, who has comitted no crime, is entitled to be free of state custody or control. The Illinois Supreme Court

has not afforded him that right. The constitutional issue is ripe for adjudication because it is state control over Walter's life which offends the Due Process Clause, not the specific form that control might take.

Respondents have not replied to the petitioner's argument that the Illinois Supreme Court has violated Walter's right to familial privacy and to equal protection. Both issues are ripe for adjudication.

(3). Standing

For the past three years the State of Illinois has been legal custodian of Walter Polovchak (although Walter is currently living with relatives). Respondents, however, contend that Walter's legal custodian has no standing to ask that Walter's constitutional rights be respected. That doctrine would certainly be an innovation in American law. The traditional doctrine is that a parent or legal custodian may assert the rights of a minor. F.R.C.P. 17(a). For example, in the famous *Brown* v. *Board of Education* case the petitioners appeared through their parents or guardians. *Brown* v. *Board of Education of Topeka,* 347 U.S. 483, 487 (1954). In addition, the State of Illinois has an interest of its own in seeing that its custody of Walter is either continued or vacated in a constitutional manner.

In any event the question of standing is of no importance at this point, since the question before this Court is whether certiorari should be granted. Certainly the State of Illinois has standing to suggest that there are important issues involved in this case which should be reviewed by this Court. If this Court were to grant certiorari on the issues raised in the State's petition, Wal-

ter could then assert those issues on his own behalf. He would do so because he ". . . has reviewed the State's petition herein, and supports it fully." (Walter's Pet. 9)

(4). Waiver

In the Illinois courts the State argued that Walter Polovchak was a minor in need of supervision under the MINS provisions of the Juvenile Court Act. Ill. Rev. Stat. 1979, Ch. 37, sec. 702-3. At no time did the State argue that the Illinois courts had any power over Walter other than that conferred by the Act. The Illinois Supreme Court ruled that the Juvenile Court had no statutory power over Walter, but remanded to the Juvenile Court anyway, giving it control over Walter's life. Thus the State's position now, that Walter may not be placed in custody without a finding that it is necessary for his welfare or protection, is entirely consistent with every other position it has taken in this case.

B. If Walter Is Forcibly Removed to the Soviet Union, No Federal or State Court Would Have the Power to Protect His Rights.

In its petition the State of Illinois pointed out that the practical effect of the remand could be the forcible and illegal removal of Walter Polovchak from this country. The Illinois Supreme Court ordered that Walter be returned to the custody of his parents. As a practical matter this might well give them the power to remove Walter from this country, since a resident of this country can cross the Canadian or Mexican boarder, enter a foreign embassy or consulate or board a ship or aircraft without even notifying any official of the United States government.

These considerations are relevant to the issue of certiorari since, if Walter is removed from the United States, he will have no remedy in any American court. Certainly this Court may consider on the issue of certiorari whether a petitioner has any other remedy.

Respondents assert that they will obey the federal departure control order now in effect. But it would be optimistic to assume that two Soviet citizens would obey an order that both they and their government have denounced as illegal and a violation of human rights.

In its petition the State of Illinois asserted that the order returning Walter to his parents violates equal protection. (State's Pet. 13) Other minors in Illinois are not required to remain in the home of their parents. Ill. Rev. Stat. 1983, Ch. 37, secs. 703-1.1(c), 703-1.1(d), 702-3. Therefore the constitutionality of that order would be before this Court after a grant of certiorari.

CONCLUSION

For the reasons stated above and in their Petition for a Writ of Certiorari, the State of Illinois respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the Illinois Supreme Court.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General,
State of Illinois,
188 West Randolph Street,
Suite 2200
Chicago, Illinois 60601,
Attorney for Petitioner.

RICHARD M. DALEY,
State's Attorney,
County of Cook,
500 Richard J. Daley Center,
Chicago, Illinois 60602,

MICHAEL E. SHABAT,*
KEVIN SWEENEY,
Assistant State's Attorneys,
Of Counsel.
* Counsel of Record

312) 443-5496